IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-873

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, *et al.*,
Petitioners,

v.

JOSEPH CALIFANO, Secretary, United States Department of Health, Education and Welfare, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* *

INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of President John F. Kennedy to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Committee's membership today includes former Attorneys General, past Presidents of the American Bar Association, a number of law school deans, and many of the nation's leading lawyers. Through its national office in Washington, D.C. and its offices in Jackson,

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* Letters from counsel for the parties consenting to the filing of this Brief have been filed with the Clerk of this Court.

Mississippi and eight other cities, the Lawyers' Committee over the past sixteen years has enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor in education, employment, voting, housing, municipal services, the administration of justice, and law enforcement.

The Lawyers' Committee and its local committees, affiliates, and volunteer lawyers have been actively engaged in providing legal representation to those seeking relief under federal civil rights legislation. That representation has included assistance in school desegregation cases raising issues of faculty assignment similar to those presented here. In addition, the Committee for many years has dealt with various federal agencies, including the Department of Health, Education and Welfare, and, as a result, has knowledge and expertise concerning the legislation which the Department seeks to enforce and the effectiveness of its efforts.

Historically, the Lawyers' Committee has strongly endorsed vigorous action by the Executive and Legislative branches to support school desegregation. We believe that federal grant-in-aid programs like the Emergency School Aid Act (ESAA) which specify conditions of successful, effective integration that must be met if a recipient is to be eligible for funds, are proper and desirable mechanisms to implement the national policy favoring school desegregation. To the extent compliance with such conditions is enforced, that policy will be effectuated.

In 1970 the Lawyers' Committee, with the help of hundreds of volunteer attorneys, worked with other civil rights groups to investigate the operation of the federal desegregation grant scheme which preceded ESAA: the Emergency School Assistance Program (ESAP).[1] That effort documented administrative failure to enforce pro-

[1] P.L. 91-380. *See* pp. 16-20 *infra*.

visions of the ESAP regulations[2] which had been designed, on paper, to insure that school districts receiving funds were meeting desegregation requirements.[3] As we show below, the Congress which enacted ESAA inserted specific conditions of eligibility (including the one which is at issue in this case) into the law so as to avoid a repetition of these difficulties.

The Lawyers' Committee believes that ESAA has proved to be an effective instrument and incentive for school desegregation. That is primarily the case because the law establishes conditions of eligibility for funding which are susceptible to rapid, objective measurement in *pre-grant* reviews of applicants.[4] In accordance with

[2] The ESAP program was proposed by President Richard M. Nixon on May 21, 1970. In order to permit ESAP to go into effect in the Fall of 1970, funds were reallocated under several different education programs. This was accomplished through appropriations legislation, P.L. 91-380, 84 Stat. 800, *reprinted in* [1970] U.S. CODE CONG. & ADM. NEWS 942. Except for prohibitions against the transfer of property or services to discriminating private schools, a nonsupplanting clause, and a maintenance of effort requirement, the only substantive restrictions on the use of funds were accordingly contained in the regulations issued (without prior publication for comment) on August 22, 1970, 35 Fed. Reg. 13442, *reprinted as* 45 C.F.R. Part 181 (1971).

[3] Washington Research Project, et al., THE EMERGENCY SCHOOL ASSISTANCE PROGRAM: AN EVALUATION (1970). *See also*, Washington Research Project, et al., THE STATUS OF SCHOOL DESEGREGATION IN THE SOUTH, 1970 (1970). A less extensive, but officially sponsored, study also documented serious defects in administration of ESAP, including the funding of a district where the pattern of faculty assignments violated the regulations. *See* General Accounting Office, *Need to Improve Policies and Procedures for Approving Grants Under the Emergency School Assistance Program* (1971), *reprinted in Emergency School Aid Act: Hearings on H.R. 2266 Before the General Subcommittee on Education of the House Comm. on Education and Labor*, 92d Cong., 1st Sess. 89, 134 (1971).

[4] In 1978 the Congress reauthorized ESAA without modifications material to this case. It did, however, emphasize the desirability of quick completion of eligibility determinations in order to avoid funding delays to school districts ultimately determined by HEW to be

principles of administrative law, the burden of producing information adequate to demonstrate that the eligibility conditions have been satisfied is upon the applicant; the statute has been administered in this manner for seven years.[5]

The interpretation of the statute pressed by Petitioners here, however, would drastically alter this administrative scheme. If HEW may deny an ESAA application only when it can demonstrate an intentional constitutional violation by the applicant, the burden of investigation and presentation of evidence sufficient to prove intent (and thus ineligibility) will have to be borne by agency personnel. There will cease to be any distinction between ineligibility rulings and determinations of Title VI [6] violations which justify withdrawal of all federal funding.[7] For all practical purposes, the *special* ineligibility conditions written into the ESAA statute will cease to exist, and Congress' effort to complement Title VI enforcement through this mechanism will be destroyed. The result will be a diminished level of enforcement activity and a decline in the achievement of equal opportunity in the school systems of the nation.

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eligible. *See* § 610(b) of the Elementary and Secondary Education Act of 1965, as added by § 601(a) of the Education Amendments of 1978, P.L. 95-561, 92 Stat. 2252, 2262, *reprinted in* [1978] U.S. CODE CONG. & ADM. NEWS. *See also, id.* at 5069, 5189.

[5] Because this is the established procedure, the ESAA applicant pre-grant reviews have been tasks of manageable proportions which do not swamp the limited resources of the Office for Civil Rights (OCR), HEW. *See* 44 Fed. Reg. 5204 (Jan. 25, 1979); 43 Fed. Reg. 7048 (Feb. 17, 1978); 42 Fed. Reg. 11154 (Feb. 25, 1977) [annual operating plans].

[6] Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

[7] *See Regents* v. *Bakke*, 57 L. Ed. 2d 750, 767-69 (opinion of Powell, J.); *id.* at 793, 795-803, 810 (opinion of Brennan, White, Marshall and Blackmun, JJ.); *id.* at 851 n. 21 and accompanying text (opinion of Stevens, J., Burger, C.J., Stewart and Rehnquist, JJ.) (1978).

The Committee views such possibility with dismay. Because nothing in the ESAA statute or its legislative history supports the interpretation offered by Petitioners, and in light of our longstanding concern about the ESAA program, we file this brief *amicus curiae* for the assistance of the Court.

SUMMARY OF ARGUMENT

Introduction

The only issue which requires decision by this Court is whether § 1605(d)(1)(B) of the Emergency School Aid Act was intended to incorporate constitutional standards in determining the eligibility of school districts to receive funds. Neither the scope of Title VI of the 1964 Civil Rights Act nor application of constitutional standards to the facts of record is involved at this stage of the litigation, since the Court of Appeals' reference to Title VI was only incidental, and since the Court of Appeals did not pass upon the correctness of the district judge's constitutional ruling. Resolution of the statutory construction question, however, will have a significant impact upon the operation of the ESAA program because of the increased burden which would be placed upon the administrative agency if the statute is held to incorporate constitutional standards.

I

The language, legislative history and administrative interpretation of § 1605(d)(1)(B) all support the construction adopted by the Court of Appeals. The specific conditions of ineligibility contained in § 1605(d)(1) were adopted by the Congress in response to criticism by civil rights organizations of the predecessor Emergency School Assistance Program—including the specific complaint that funds were awarded to districts in which faculty segregation persisted. The clauses of § 1605(d)(1) were in-

tended to prevent repetition of such abuses. Moreover, an amendment requiring a showing of intent was proposed and adopted as a part of clause (A) but not clause (B)—the specific provision of the statute at issue in this case—and the Senate rejected another amendment which would explicitly have adopted constitutional standards by barring the establishment of any additional eligibility criteria for districts operating pursuant to court order. Finally, when ESAA was reauthorized in 1978, Congress was made aware of the statutory interpretation followed by the Department of Health, Education and Welfare and its specific application to Petitioners' school district. Nevertheless, no change in the language of clause (B) was suggested, and an alternative amendment addressed to the faculty segregation-ineligibility issue was passed by the House of Representatives but eliminated by the conference committee. Hence, the Congress has adopted and continued the original agency interpretation of the statute pursuant to which Petitioners' school district was held ineligible for assistance in 1977-78.

II

If the Court does hold that § 1605(d)(1)(B) incorporates constitutional standards requiring a showing of intentional discrimination, it should provide guidance to the lower courts concerning application of those standards to the faculty assignment setting. Specifically, the Court should announce that where a strong *prima facie* showing of discrimination is made out (as here) by statistics demonstrating a high correlation between the student body and faculty racial composition of the schools within a district, it may be overcome only by clear and convincing evidence that faculty were assigned pursuant to a nonracial mechanism which avoided the opportunity for discrimination to affect the process.

ARGUMENT

Introduction

The issue in this case is a very narrow one. Petitioners' applications for ESAA funds for the 1977-78 school year were denied because of HEW's determination that Petitioners were ineligible under 20 U.S.C.S. § 1605(d)(1)(B) (Supp. 1978),[8] and the regulation interpreting that clause. That determination was grounded upon HEW's finding that faculty members within the New York City school system were assigned "in such a manner as to identify . . . schools as intended for students of a particular race, color or national origin," 45 C.F.R. § 185.43(b)(2) (1978).[9] Petitioners contend that the regulation is an incorrect interpretation of § 1605(d)(1)(B) because the Act makes ineligibility depend upon a showing of a constitutional violation.[10] Only the issue of statutory construction (Question No. 1[11]) is appropriately before this Court in the present posture of this case.[12]

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[8] As previously noted, ESAA was reauthorized in the Education Amendments of 1978. The section in question is now codified at 20 U.S.C.S. § 3196(c)(1)(B) (Supp. 1979).

[9] Pursuant to the district court's Order of November 18, 1977 (Pet. App. 30), HEW subsequently reconsidered Petitioners' eligibility under the "constitutional standards" which it set forth, and found there was an unremedied constitutional violation with respect to faculty assignment. That finding was not passed upon by the Court of Appeals. See text *infra*.

[10] Such a showing must be based upon evidence demonstrating intent or purpose to discriminate. *Keyes* v. *School Dist. No. 1, Denver*, 413 U.S. 189, 198, 206-08 (1973); *Washington* v. *Davis*, 426 U.S. 229, 238-48 (1976); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-68 (1977).

[11] *See* Pet. Br. at 2.

[12] The Court of Appeals has not passed upon the remaining questions framed by Petitioners, nor has it indicated what evidence would be required, in its view, to demonstrate a constitutional viola-

Furthermore, even if constitutional standards should have been engrafted upon § 1605(d)(1)(B), the practical import of failing to do so in the case at hand is doubtful. Petitioners have never denied that the pattern of faculty assignment in their schools was strongly correlated with the pattern of student body racial composition. Instead, they have urged that a variety of explanations be accepted in justification of a situation "where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, ..." *Swann* v. *Charlotte-*

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tion with respect to faculty assignment. Rather, the Court of Appeals explicitly declined to review the district court's ruling that there was substantial evidence to sustain HEW's finding of constitutional violations (App. 150). And a careful reading of the Second Circuit's opinion demonstrates that it did not hold that Petitioners had violated Title VI, but only adverted to Title VI in support of its interpretation of the ESAA statutory ineligibility provisions. 584 F.2d at 589. Under these circumstances, until this Court has "the valuable assistance of the Court of Appeals," *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 175 n.1 (1963), it should not reach the other matters sought to be raised by Petitioners even if it concludes that the Court of Appeals erred in its construction of ESAA. *See, e.g., Davis* v. *Passman*, 47 U.S.L.W. 4643 (June 5, 1979); *Furnco Constr. Corp.* v. *Waters*, 57 L. Ed. 2d 957, 969-70 (1978); *Wise* v. *Lipscomb*, 57 L. Ed. 2d 411, 421-22 (1978); *Wood* v. *Strickland*, 420 U.S. 308, 327 (1975).

For similar reasons, the Court is not called upon in this matter to weigh the factual evidence presented on the administrative record; certainly Petitioners reach well beyond the issues upon which review was granted in seeking a remand with instructions that the district court require "HEW to dispense the withheld ESAA funds to the Board." Pet. Br. at 67. If the Second Circuit's interpretation of the ESAA eligibility standard is correct, then its determination that Petitioners failed to meet that standard is due to be accepted by this Court pursuant to the "two-court rule." *See Berenyi* v. *Immigration Serv.*, 385 U.S. 630 (1967). (Since the district court upheld HEW's finding of ineligibility while applying a stricter standard than the Court of Appeals, its ruling under the Second Circuit's test of eligibility is *a fortiori* the same.) Even if the Second Circuit and the district court erred, this Court should clarify the legal standard but remand for its appropriate application by the trial judge in the first instance.

Mecklenburg Bd. of Educ., 402 U.S. 1, 18 (1971). And they adhere to this position despite the existence in the record (usually not available to this Court at the time review is granted) of admissions that at least some of their "explanations" have an explicitly racial basis.[13]

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[13] For example, one of Petitioners' "explanations" is the operation of the 1969 New York School Decentralization Law, which permitted certain community school districts to bypass the Board of Examiners' rank-ordered listings of applicants for teaching positions. This procedure resulted in the accelerated hiring of minority applicants in those community districts. Petitioners allege an explicitly racial basis for this feature of the Decentralization Law. The purposes of the law were, according to the *Verified Complaint*, to ". . . (2) increase the number of minority teachers employed in the New York public School system," *but* not on a system-wide basis. Rather,

> [r]evisions of the New York Education Law were based on these factors: (a) City public school student population had dramatically changed from predominantly non-minority to predominantly minority . . . (c) low reading achievement, particularly among minority students, fostered a developing educational consensus that *minority teacher role-model theories* should be explored, at least experimentally, in schools where low reading levels warrant new educational approaches:

Verified Complaint, ¶ 27B, Ct. App. App. at 11-12; *Amended Verified Complaint*, ¶ 27B, Ct. App. App. at 515-16 (emphasis supplied).

Or, as more forthrightly described in a letter to the city school system's Deputy Chancellor describing the basis for the 1969 enactment, which is quoted approvingly in the Complaint,

> . . . A political compromise was reached whereby heavily minority schools—correlated with schools below the 45th percentile in reading scores—might hire teachers [in a way] . . . which, it was felt, would enlarge the pool of minority candidates and thereby increase the percentage of minority teachers. Schools whose reading scores were above the 45th percentile were required to hire from the rank order lists.

Verified Complaint, ¶ 16, Ct. App. App. at 39. *See also*, Ct. App. App. 209-11 (District Court Order of November 18, 1977). In other words, by deliberate structuring of the law, it became permissible to hire additional minority teachers, but only if they were restricted to areas of the system in which minority pupils predominated. Indeed, the chief executive officer of the New York City school system stated that any attempt to match the ratio of minority teachers assigned to schools serving the "overwhelmingly minority student concentra-

These admissions in Petitioners' own pleadings make it apparent that there is but a tenuous possibility that Petitioners could have been found eligible for ESAA funds in 1977-78, whatever legal standards were applied. Rather than give full consideration to the case, therefore, the Court may wish to dismiss the writ as improvidently granted.

As we suggested in the Statement of Interest, *supra*, a decision sustaining Petitioners' interpretation of ESAA would seriously inhibit progress which has been made as a result of enforcing the eligibility conditions for assistance under the Act. The Director of the Office for Civil Rights, HEW, testified in 1977 that

> [i]t is our judgment that the pre-grant conditions of the kind contained in the ESAA statute are among the most effective ways of enforcing nondiscrimination provisions of law and ensuring equal opportunities for the beneficiaries and potential beneficiaries of Federal financial assistance.[14]

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tion in Manhattan" to the systemwide faculty ratio was "educationally pointless." *Anker affidavit*, App. 93-94.

[14] He preceded the statement quoted in text by summarizing the Office's experience with the ESAA program as follows:

> In requiring compliance with specific civil rights provisions as a precondition to the award of Federal financial assistance, the ESAA program has had a significant role in the prevention and elimination of unlawful discrimination. In each of the funding cycles subsequent to the enactment of the statute, significant numbers of students have been reassigned from racially identifiable classes (including racially isolated classes) and racially identifiable special education programs determined to be educationally unjustified. A number of comprehensive plans have been adopted to provide equal services to national origin minority children. Several thousand teachers have been reassigned to eliminate racially identifiable school staffs and a number of affirmative action employment programs have been adopted where disproportionate demotions or dismissals of

For example, during Fiscal Year 1976, 23 applicants for ESAA funding were initially declared ineligible because of teacher assignment problems; four determinations of ineligibility based on applications processed for Fiscal Year 1977 as of June 8, 1977 related to faculty assignment.[15] Most of the districts were able to take swift corrective action and obtain waivers of ineligibility.[16]

This effective catalyst for change will be jeopardized, we repeat, by the ruling sought by Petitioners, because the level of detail and the amount of information which the Office for Civil Rights would have to amass in order to support a finding not only that racially identifiable faculties exist, but that their existence stems from "intentional discrimination," would make impossible rapid, pre-grant eligibility clearances. This Court has often remarked on the fact that "[f]indings as to the motivations of multimembered public bodies are of necessity difficult," *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 414 (1977). It is one thing to require such findings of a

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minority faculty took place during the desegregation of school systems.

Part 4: Emergency School Aid Act, Hearings on H.R. 15 Before the Subcommittee on Elementary, Secondary and Vocational Education of the House Comm. on Education and Labor, 95th Cong., 1st Sess. 31-32 (1977).

[15] *Id.* at 29-31.

[16] *Id.* at 54:

> Mr. JENNINGS. With your first point, don't you think, even though the numbers which ultimately don't qualify seem to be small, just the existence of these provisions in the law causes school administrators to become discouraged from approaching for pre-integration types of activities. Therefore, the existence of these things probably scares people away.
>
> Mr. TATEL. I don't know. What I see there are 800 applications that seem to me to be a lot. When I look at the fact that virtually all the districts we find ineligible virtually always obtain eligibility [that] would lead me to believe they can surmount these problems.

court granting a judgment in constitutional litigation, or of an agency proposing to terminate *all* Federal financial assistance because of a violation of Title VI of the 1964 Civil Rights Act.[17] It is quite another, we suggest, to require similar findings by an agency passing upon an application for funds under one specific program, and seeking to apply criteria developed to implement conditions of eligibility contained in that program statute. Only if there are compelling indications in the legislative language or history that this was the Congressional intention should such a result obtain.

I. § 1605(d)(1)(B) WAS INTENDED TO MAKE INELIGIBLE FOR ASSISTANCE THOSE DISTRICTS IN WHICH SCHOOLS ARE RACIALLY IDENTIFIABLE BY VIRTUE OF A PATTERN OF MINORITY FACULTY ASSIGNMENT WHICH CORRESPONDS TO THE PATTERN OF MINORITY STUDENT ENROLLMENT

The Emergency School Aid Act of 1972, at 20 U.S.C.S. § 1605(d)(1)(B) (Supp. 1978) requires, as a condition of eligibility for receiving funds, that an applicant school district not have

> had in effect [after June 23, 1972] any practice, policy, or procedure which results in the disproportionate demotion or dismissal of instructional or other personnel from minority groups in conjunction with desegregation or the implementation of any plan or the conduct of any activity described in this section, *or otherwise engaged in discrimination based upon race, color, or national origin in the hiring, promotion, or assignment of employees of the agency* (or other personnel for whom the agency has any administrative responsibility) [.]

[17] *See* note 7, *supra*.

The Act is administered by the Department of Health, Education and Welfare (HEW), which has adopted regulations to carry out the statutory objectives. The provision of the regulations which is pertinent to the above-quoted section of the law is 45 C.F.R. § 185.43(b)(2)(1978):

> No educational agency shall be eligible for assistance under the Act if, after June 23, 1972, it has had or maintained in effect any other practice, policy, or procedure which results in discrimination on the basis of race, color, or national origin in the recruiting, hiring, promotion, payment, demotion, dismissal, or assignment of any of its employees (or any other personnel for which such agency has any administrative responsibility), *including the assignment of full-time classroom teachers to the schools of such agency in such a manner as to identify any of such schools as intended for students of a particular race, color, or national origin.*

Succinctly put, the question before this Court is whether the italicized portion of the regulation and its application to this case by HEW "constitute an unauthorized extension of the [eligibility requirements] imposed by [the italicized language of the] statute," *Davis* v. *Southeastern Community College*, 47 U.S.L.W. 4689, 4692 (June 11, 1979).

We demonstrate below that (a) the regulation is not inconsistent with the statute; (b) the legislative history of the provision, and of the ESAA as a whole, fully supports the HEW interpretation; and (c) Congress accepted and adopted HEW's interpretation when it reauthorized ESAA in 1978 without any change in clause (B).

A. The Statutory Language

Clause (B) of § 1605(d)(1) contains two phrases, connected by the disjunctive "or." The phrases are not independent of one another, however, because of the use of the term "otherwise" in the clause. The logical construction of the clause is that the first phrase is considered to be one example of the more general category described in the second; just as one would construe the similarly constructed clause, "bought apples, *or otherwise* purchased fruit" to indicate that the author considered apples to be one sort of fruit. While this exposition of syntax may seem tedious, it is of considerable significance to Petitioners' case. For if the first phrase permits, in Petitioners' characterization, a "disparate impact" test of eligibility, then it is far from evident as a matter of simple grammatical usage that such a test of eligibility under the phrase following the words "or otherwise" is impermissible.

Complete separation in meaning of the two phrases in clause (B) is a critical step in Petitioners' argument. Only if the meaning of the words "engaged in discrimination" is to be determined independently of the first phrase can it be asserted that Congress had no specific practices in mind when it used these words, but rather intended to adopt only constitutional standards of discrimination. Our review of the language and the legislative history, on the other hand, suggests that the first phrase is exemplary of the second, and that Congress intended in the more general language of the second phrase to cover other specific practices, including faculty assignment patterns which caused schools to be racially identifiable.

Petitioners rely heavily upon the use of the word "*presumes*" at p. 41 of the Senate Report on one of the proposed ESAA bills (Pet. Br. at 25-26). This indicates, they say, that "the Senate Committee in considering section 1605(d)(1)(B) made a *significant and conscious distinction* between the language of the section which relates to 'demotion or dismissal' and that which relates to 'hiring, promotion or assignment'" (*id.* at 26) (emphasis added). We cannot agree. As we suggested above, this construction does violence to the grammar of the clause. In addition, the same Senate Report also contains language consistent with the view that the first phrase of clause (B) is exemplary, and that what Petitioners call a "disparate impact" test applies to the entire set of ineligibilities. The Report states:

> . . . For the purposes of this bill, disproportionate demotion or dismissal of instructional or other personnel is considered discriminatory and constitutes *per se* a violation of this provision, when it occurs in conjunction with desegregation, the establishment of an integrated school, or reducing, eliminating or preventing minority group isolation.[18]

Had Congress intended to make a sharp distinction in meaning between the two phrases, it would not have described disproportionate minority staff reduction as "*per se*" a violation of "this provision." Furthermore, just prior to the language quoted by Petitioners, the Senate Report declares:

> The language used in that part of paragraph (1) which precedes clause (A) is designed to render local educational agencies ineligible if they cause to occur, *or permit to exist*, those activities described in clauses (A), (B), (C), or (D). . . .[19]

This description of the statutory ineligibility section simply cannot be squared with Petitioners' arguments

[18] S. REP. No. 92-61, 92d Cong., 1st Sess. 18-19 (1971) [emphasis in original].

[19] *Id.* at 41 [emphasis supplied].

that disqualification on any ground except disproportionate minority staff reduction requires a showing of intentional conduct. The more sensible reading of the language of clause (B), and of the entire Senate Report, is that Congress sought to delineate minimum standards of desegregation-related conduct for ESAA recipient eligibility. Since the legislative history indicates that included among the specific conduct which the Congress sought to prevent was the maintenance of faculty assignments resulting in racially identifiable schools, the language of the clause is no bar to an HEW regulation which gives effect to this intention.

B. The Legislative History

The course of ESAA was extraordinarily tortuous. First proposed by the President in 1970, it was passed in different versions on several occasions by each House of Congress before ultimate enactment in 1972. Petitioners' discussion of the legislative background (Br. at 19-40) barely plumbs the surface of this process, and omits entirely consideration of the earliest legislative efforts, which settled some of the basic issues carried forward in later versions of the bills. In order to present the history of the statute as a whole, and to assist the Court in tracing the background, we describe it in some detail.

1. *Spring and Summer, 1970*

The concept of ESAA emerged on March 24, 1970, when the President of the United States issued a statement discussing school desegregation and busing, and outlining the policies which the national administration would follow. Although President Nixon had strong personal reservations about busing, he favored faculty integration.[20] "In order to give substance to these commit-

[20] I have instructed the Attorney General, the Secretary of Health, Education and Welfare, and other appropriate officials of the Government to be guided by these basic principles and policies:

. . .

Segregation of teachers must be eliminated. To this end, each school system in this Nation, North, South, East and West, must move immediately, as the Supreme Court has ruled, toward a goal under which "in each school the ratio of white to Negro faculty members is substantially the same as it is thoughout the system."

1970 PUB. PAPERS 315 (1971).

ments," the President said, he would propose legislation to make Federal funds available to school systems which were desegregating.[21]

The President sent his legislation to the Congress on May 21, 1970;[22] shortly thereafter, a bill embodying his program was introduced in the House of Representatives.[23] It did not contain any conditions of eligibility or specific requirement for faculty integration. Two weeks later, in the initial hearings on the proposal, there was skepticism about the administration's motives and concern that most of the funds would go to school districts which had resisted court decrees, without any requirement that meaningful integration occur or that discrimi-

[21] I will ask Congress to divert $500 million from my previous budget requests for other domestic programs for fiscal 1971, to be put instead into programs for improving education in racially impacted areas, North and South, and for assisting school districts in meeting special problems incident to court-ordered desegregation. For fiscal 1972, I have ordered that $1 billion be budgeted for the same purposes.

Id. at 317.

[22] *Id.* at 448, *reprinted in Emergency School Aid Act of 1970, Hearings on H.R. 17846 and Related Bills Before the General Subcommittee on Education of the House Comm. on Education and Education and Labor*, 91st Cong., 2d Sess. 21 (1970) [hereinafter cited as *1970 House Hearings*].

[23] H.R. 17846, 91st Cong., 2d Sess. (1970), *reprinted in 1970 House Hearings* at 2-17.

natory practices be ended.[24] Although the Secretary of HEW indicated that the Department was in the process of preparing program criteria,[25] he and other witnesses were repeatedly asked whether Congress ought not to include restrictions on eligibility within the legislation itself. There was agreement that such limitations should be contained either in the statute or in regulations.[26] Similar testimony was given before the Senate Select Committee on Equal Educational Opportunity,[27] and was considered by the Senate committee to which the President's bill had been referred.[28]

Congress was unable to complete action on the measure in time for the opening of school in the Fall of 1970. Instead, $75 million was made available for an "Emergency School Assistance Program" (ESAP) in the 1971 Office of Education Appropriation Act, P.L. 91-380,[29] which passed both Houses over the President's veto on August 18, 1970. In order to have the program operational when school opened, HEW on August 22, 1970 issued regulations without a prior public comment period. 35 Fed. Reg. 13442 (August 22, 1970).

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[24] *E.g., 1970 House Hearings* at 36-37 (Rep. Hawkins), 64-65 (Rep. Ford).

[25] *1970 House Hearings* at 43.

[26] *E.g., 1970 House Hearings* at 66 (HEW Secretary Finch), 125 (Dr. James S. Coleman), 256 (Prof. Alexander Bickel).

[27] *Equal Educational Opportunity, Hearings before the Senate Select Committee on Equal Educational Opportunity,* 91st Cong., 2d Sess. 992, 1282-83, 1462, 1518, 1528 (1970) [hereinafter cited as *Select Committee Hearings*].

[28] "Senator PELL. The Mondale committee and this subcommittee are working very closely. The material furnished to the Mondale committee will be sifted out and given to us. I wouldn't want to duplicate it." *Emergency School Aid Act of 1970: Hearings on S. 3883 and S. 4167 Before the Subcommittee on Education of the Senate Comm. on Labor and Public Welfare,* 91st Cong., 2d Sess. 121 (1970).

[29] 84 Stat. 800, *reprinted in* [1970] U.S. CODE CONG. & ADM. NEWS 942.

Those initial ESAP regulations, 45 C.F.R. Part 181 (1971), reflected both the President's design and the Congressional concerns which had been expressed during the 1970 hearings and the debates on the appropriations measure.[30] The regulations contained specific eligibility requirements disqualifying school systems which had engaged in the discriminatory practices condemned in the hearings.[31] The regulations also made fully integrated faculty assignments a precondition for assistance.[32]

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[30] The first attempt to establish the program took place when the Senate amended H.R. 17399, 91st Cong., 2d Sess. (1970), the Second Supplemental Appropriation bill, to include a $150 million allocation for an ESAP program. When the bill was debated, Senator Mondale voiced worries "that these funds may be wasted in desegregated schools which: . . . Have discriminatorily fired or demoted black faculty, Or in other ways have abused and circumvented the goal of quality integrated education." 116 CONG. REC. 19930 (June 16, 1970). Accordingly, he proposed three amendments to prevent this result. But all ESAP provisions were stricken from H.R. 17399 in the Senate on a point of order. 116 CONG. REC. 10818 (June 22, 1970). Subsequently, Senator Javits introduced them—incorporating the Mondale amendments—as an amendment to H.R. 16916, 91st Cong., 2d Sess. (1970), the Office of Education Appropriation bill. 116 CONG. REC. 21218 (June 24, 1970). The Javits proposal was added to the bill the next day, *id.* at 21485, and the measure was passed by the Senate, *id.* at 21509 (June 25, 1970). The Conference Committee recommended adoption of the Senate ESAP version with a reduction in funds to $75 million, which was accepted by both Houses. *Id.* at 24581 (July 16, 1970) [House], 26215 (July 28, 1970) [Senate]. Following the President's veto, Congress enacted the measure by the requisite two-thirds majority vote. *Id.* at 28779 (August 13, 1970) [House], 29391 (August 18, 1970) [Senate].

[31] For example, the regulations required an assurance that minority faculty members would not be demoted or dismissed in the desegregation process. 45 C.F.R. § 181.6(a)(4)(v) (1971). *See, e.g., 1970 House Hearings* at 189-90, 205, 676; *Select Committee Hearings* at 939, 945, 1156-59, 1517, 1836-37. The legislation itself barred recipients of aid from transferring property or services to racially discriminatory private schools, and from reducing state and local support to desegregating schools and districts, as a result of Senator Mondale's amendments. *See* note 30 *supra.*

[32] . . . (a) An application of a local educational agency for assistance under the program shall—

The twin themes of avoiding discriminatory practices and assuring that funds were awarded only to systems in which effective desegregation took place continued to be sounded throughout the subsequent Congressional deliberations leading up to eventual adoption of ESAA.

2. *Fall and Winter, 1970*

By the time the Congress returned to its consideration of ESAA, substantially more information about the operation of ESAP, and the need for strengthened civil rights provisions in the legislation, was available. In late 1970, six civil rights organizations released a joint study of ESAP's first funding cycle.[33] Their report was highly critical of the program's administration. Because

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> . . . (4) Contain assurances satisfactory to the Commissioner accompanied by such supportive information as he may require:
>
> > . . . (vi) That the local educational agency will take effective action to ensure the assignment of staff members who work directly with children at a school so that the ratio of minority to nonminority group teachers in each school, and the ratio of other staff in each, are substantially the same as each such ratio is to the teachers and other staff, respectively, in the entire school system[.]

45 C.F.R. § 181.6(a)(4)(vi) (1971). § 181.2 of the ESAP regulations stated that the

> purpose of the emergency assistance to be made available under the program described in this part is to meet special needs incident to the elimination of racial segregation and discrimination among students and faculty in elementary and secondary schools by contributing to the costs of new or expanded activities to be carried out by local educational agencies or other agencies, organizations, or institutions and *designed to achieve successful desegregation* and the elimination of all forms of discrimination in the schools on the basis of students or faculty being members of a minority group. [emphasis supplied]

[33] Washington Research Project, et al., THE EMERGENCY SCHOOL ASSISTANCE PROGRAM, AN EVALUATION (1970).

of the desire to distribute funds by the beginning of the fall semester, it charged, money had been practically given away without either an evaluation of contemplated program quality or adequate civil rights protections.[34] These allegations figured prominently in the next round of hearings and debates on the proposed (authorizing) legislation.[35]

A new version of the bill had been introduced in the House of Representatives on September 24, 1970. H.R. 19446, 91st Cong., 2d Sess. (1970) at that time contained no conditions of eligibility similar to those now part of ESAA. However, as knowledge of the ESAP fiasco spread, modifications were made by the subcommittee to which the bill had been referred. *See* H.R. REP. No. 91-1634, 91st Cong., 2d Sess. 8 (1970). When the bill was reported to the floor, Representative Pucinski stated this explicitly.[36] During the debates which preceded passage of the measure on December 21, 1970, 116 CONG. REC. 43145, other members of the House exhibited

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[34] *Id.* at 14-17. *See also*, Washington Research Project, et al., THE STATUS OF SCHOOL DESEGREGATION IN THE SOUTH, 1970 (1970).

[35] *See, e.g., Emergency School Aid, 1971: Hearings on S. 195 Before the Subcommittee on Education of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 1st Sess. 110 (1971) [hereinafter cited as *1971 Senate Hearings*]; 116 CONG. REC. 42218, 42223 (Rep. Pucinski), 42222, 42223 (Rep. Hawkins), 42222, 42224, 42230 (Rep. Conyers), 42224, 42231 (Rep. Reid) (December 17, 1970), 43143 (Rep. Ryan) (December 21, 1970).

[36] Mr. PUCINSKI. . . . a task force has made a study of the $75 million and the task force was in many ways critical of the program. That $75 million was put together with paper clips, Scotch tape and chewing gum with no guidelines, no criteria and no specific requirements, covering five different programs. This legislation now pending before us, I ask my colleague from Michigan to carefully review it and he will find that we have carefully written into law the kind of prohibitions and guidelines and standards which will preclude the recurrence of the criticism that was leveled at the first $75 million.

116 CONG. REC. 42218 (December 17, 1970).

familiarity with the substance of the civil rights groups' report.[37] H.R. 19446 (as reported to the floor) responded to these problems by requiring a civil rights assurance covering assignment of faculty.[38] Although, as noted, the

[37] For example:

> Mr. RYAN. . . .
>
> In voting for the Emergency School Aid Act of 1970, therefore, I do so cognizant that the Congress must exercise a stringent oversight function to assure that its provisions are not misused, because the administration's record is dismal. In fact, the very program authorized by this bill has already been abused. In August, $75 million was appropriated for the progenitor of the program authorized by the bill before us today. By virtue of this appropriation, $71.4 million has been distributed. And an evaluation released on November 24 by the same groups which published "The Status of School Desegregation in the South, 1970" reveals the misuse of those funds.
>
> Let me briefly run down the list of defects which the November 24 report, entitled "The Emergency School Assistance Program: An Evaluation," detailed with regard to the administration of the emergency school assistance program, whose promise the report describes as having "been broken."
>
> . . .
>
> Second, making ESAP grants to districts engaged in these discriminatory practices amounts to HEW's acquiescence in fraud perpetrated by local school officials. The ESAP regulations were carefully drafted to require that each applicant guarantee that it would not engage in the practices prohibited by those regulations—among them racial discrimination in the hiring, firing, promotion, and demotion of staff; the racially imbalanced assignment of staff within the school system; . . . .

116 CONG. REC. 43143 (December 21, 1970). *See also* other comments in note 35 *supra*.

[38] Applicants were required to sign an assurance that

> staff members of the applicant who work directly with children, and professional staff of such applicant who are employed on the administrative level, will be hired, assigned, promoted, paid, demoted, dismissed or otherwise treated without regard to their membership in a minority group, except that no assignment pursuant to a court order, plan approved under title VI of the Civil Rights Act of 1964, or a plan determined to be acceptable by the Assistant Attorney General for Civil Rights

bill passed the House of Representatives on December 21, it was never approved by the Senate. Accordingly, new legislation was introduced, and new hearings held, in the 92d Congress.

3. *Spring, 1971*

Ruby G. Martin, a former Director of HEW's Office for Civil Rights and one of the report's authors, testified before both House and Senate subcommittees. In this testimony, the major problems with ESAP were identified; they included faculty segregation:

> We found cases of segregation within schools, classrooms and other facilities; cases of segregation and discrimination in bus transportation; *cases where faculty and staff had not been desegregated in accordance with applicable requirements*; . . . .[39]

As Marian Edelman, another Washington Research Project official, put it, the ESAP regulations were strongly worded but they had not been enforced.[40]

These complaints were met with sympathy and concern by figures who would play major roles in the enactment of the new legislation. For example, during the hearings

> following a notice of complaint pursuant to section 407(a) of such Act will be considered as being in violation of this subsection[.]

§ 8(a)(10), H.R. 19446, 91st Cong., 2d Sess. (1970), *reprinted at* 116 CONG. REC. 42225, 42226 (December 17, 1970).

[39] *Emergency School Aid Act: Hearings on H.R. 2266 Before the General Subcommittee on Education of the House Comm. on Education and Labor*, 92d Cong., 1st Sess. 24 (1971) [emphasis supplied] [hereinafter cited as *1971 House Hearings*]; *see also, 1971 Senate Hearings* at 121-70. *And see,* Washington Research Project, et al., THE EMERGENCY SCHOOL ASSISTANCE PROGRAM: AN EVALUATION 50-51 (1970); Washington Research Project, et al. THE STATUS OF SCHOOL DESEGREGATION IN THE SOUTH, 1970 97-100 (1970).

[40] *1971 Senate Hearings* at 143; *1971 House Hearings* at 36.

Senator Mondale asked about the eligibility of a county system in which three all-black schools had faculties 70%, 73% and 100% black while nine majority-white schools had majority-white faculties.[41] On the House side, Representative Pucinski made clear the subcommittee's interest in writing into the legislation adequate safeguards to prevent the violations listed in the report.[42] Both subcommittees were also presented with another study on ESAP, this one prepared by the General Accounting Office, which criticized the lax administration of the program.[43] While GAO studied only a small sample of approved applications, it confirmed that districts in which faculty assignments did not meet the standards of the ESAP regulations nevertheless were granted assistance.[44]

In the spring of 1971, the Senate Committee reported out (and the Senate passed) an ESAA proposal which

[41] *1971 Senate Hearings* at 365.

[42] I might say to the committee that we are very privileged to have before us two very distinguished spokesmen in the cause of better education in this country. Mrs. Ruby Martin, who is here as head of the Washington Research Project Action Council. The Action Council has done substantial work in evaluating the method in which the original $75 million was spent by the administration in schools undergoing desegregation. . . .

It had been our hope when we put together the Emergency School Aid Act of 1970 and worked it through this committee that we could write into the legislation sufficient standards and sufficient safeguards to assure against the very abuses and shortcomings which the witnesses on this occasion and on previous occasions have properly pointed out. . . .

1971 House Hearings at 17, 18.

[43] General Accounting Office, *Need to Improve Policies and Procedures for Approving Grants Under the Emergency School Assistance Program* (1971), *reprinted in 1971 House Hearings* at 89-162; *see also, 1971 Senate Hearings* at 171-74.

[44] *See 1971 House Hearings* at 134; *1971 Senate Hearings* at 174. The Commissioner of Education promised better enforcement of the regulations in districts "where serious faculty assignment problems exist." *1971 Senate Hearings* at 229.

combined features of several bills. S. 1557, 92d Cong., 1st Sess. (1971), the "Emergency School Aid and Quality Integrated Education Act of 1971," had bipartisan support led by Senators Mondale and Javits. It contained the language of current clause (B) and also laid especial stress on faculty integration. In order to qualify for assistance under this proposal, a school system would have been required to establish at least one "stable, quality integrated school" with a faculty which was "representative" either of the community at large or of the system's total faculty if the system was seeking to increase the proportion of minority group members in its employ.[45] According to the committee report, this requirement was based on acceptance of testimony that true integration and equality of educational opportunity demanded "a climate of interracial acceptance" and conditions which were "far easier to achieve if tokenism is not involved, if faculty as well as students are substantially mixed . . . ."[46] The bill's primary sponsor, Senator Mondale, specifically declared that eligibility conditions had been written into the legislation because of the failure to enforce the ESAP regulations, the civil rights groups' study, and the GAO report. 117 CONG. REC. 10759 (April 19, 1971). Its standards, he added, went beyond the Fourteenth Amendment:

> . . . And may I say that this measure is not limited to what might be termed the minimum judicially declared standards for desegregation under the 14th amendment. We go beyond that. This is a measure which bases its conclusions on what children need, on what makes educational sense, and on what the

[45] S. REP. No. 92-61, 92d Cong., 1st Sess. 12 (1971). Ultimately, the Conference Committee which reconciled the House and Senate versions of ESAA limited this requirement to applicants for "pilot program" funds. *See* 38 Fed. Reg. 3451 (February 6, 1973).

[46] S. REP. No. 92-61, 92d Cong., 1st Sess. 13 (1971).

country needs, whether the 14th amendment requires it or not.

There may well be many school districts which have desegregated in a minimum way under some court order, which falls far short of the standard that we think is necessary and that has been proven to be necessary for good, stable, quality integrated education, and this proposal is designed to be of help in that area.

117 CONG. REC. 10762 (April 19, 1971).[47]

Thus, although the bill did not define the term "discrimination" which appeared at several places within it (*see* Pet. Br. 27-29), there is ample indication that its sponsors did not intend merely to replicate constitutional standards.[48] Rather, they desired to have HEW deny

[47] *See also*, 117 CONG. REC. 10764 ("This is an education bill. It goes farther than the minimum constitutional requirement"), 10956 ("I am proud that the proposal is a creative proposal incorporating all the hopeful strategies we have been aware of and it does not stop with any legal remedies, but is bottomed on what is good for the schoolchildren of this country").

[48] This was the holding of *Board of Educ.* v. *HEW*, 396 F. Supp. 203, 230-35 (S.D. Ohio 1975), *rev'd in part on other grounds*, 532 F.2d 1070 (6th Cir. 1976), cited by Petitioners (Br. at 27). In *Adams* v. *Mathews*, Civ. No. 3095-70 (D.D.C., Order of June 14, 1976), the district court held that an HEW determination of ineligibility for ESAA funding created only a "presumption of noncompliance with Title VI" and directed HEW to proceed to investigate and enforce the Civil Rights Act in all such cases. *Bradley* v. *Milliken*, 432 F. Supp. 885, 886-87 (E.D. Mich. 1977), also cited by Petitioners, avoided a binding construction of the statute by leaving the matter to HEW. *See also*, *Bradley* v. *Milliken*, 460 F. Supp. 299, 317 (E.D. Mich. 1978) ("The problem with the present faculty distribution is that schools with a predominance of black students also have a predominantly black faculty, while schools which were traditionally white by student enrollment have a predominantly white faculty"). *Robinson* v. *Vollert*, 411 F. Supp. 461 (S.D. Tex. 1976), discussed at Pet. Br. 42-43, involved a different clause of § 1605(d)(1) and a wholly different question: whether ESAA extends so far beyond the constitutional minimum as to

funding to districts which did not carry out thorough and effective desegregation plans without any of the abuses that characterized the first year of the ESAP program.[49] This history distinguishes the ESAA legislation from Title VI of the 1964 Civil Rights Act, which a majority of this Court in *Regents* v. *Bakke*, *supra*, found was intended *only* to incorporate constitutional standards of "discrimination." *See id.*, 57 L. Ed. 2d at 767-68 (opinion of Powell, J.), 795-800, 801-02 (opinion of Brennan, White, Marshall and Blackmun, JJ.).

4. *The Stennis Amendment*

The Court of Appeals drew support for its interpretation of § 1605(d)(1)(B) from the language of § 1602(a), which was originally added to S. 1557 by the "Stennis amendment" on April 22, 1971,[50] and which was retained in all succeeding versions of the bill. *See* 584 F.2d at 588-89. Petitioners argue that the court below misconstrued the intent of the amendment as it relates to ESAA.[51] They contend that the Stennis amend-

authorize HEW to conclude that a pupil assignment plan approved under the Fourteenth Amendment by a federal district court was nevertheless "discriminatory" under ESAA. The *Robinson* court's negative response to this question was heavily influenced by separation of powers concerns which simply do not arise in this case. *See* 411 F. Supp. at 472-77. Indeed, the *Robinson* court recognized that § 1605(d) did not merely incorporate constitutional standards but "was aimed at specific forms of discrimination that may occur even in perfectly proportioned systems." *Id.* at 477.

[49] S. 1557 was the lineal ancestor of ESAA. *See* S. REP. No. 92-604, 92d Cong., 2d Sess. 2 (1972).

[50] 117 CONG. REC. 11520 (1971).

[51] The Stennis amendment applied (a) to Title VI of the 1964 Civil Rights Act and Section 182 of the Elementary and Secondary Education Amendments of 1966; and (b) to ESAA. *See* Pet. Br. at 33-34 (quoting language). The Conference Committee which drafted the final ESAA wording in 1972 effectively split the amend-

ment was designed only as precatory language, simply descriptive of the

> policy that ESAA funding is available to all segregated school systems attempting (voluntarily or otherwise) to desegregate, notwithstanding whether their segregated conditions were caused by official or non-official factors.

Pet. Br. at 33. On its face, this is a remarkable construction of legislative language which states the national policy to be that all "*guidelines and criteria* established pursuant to this chapter" shall be applied uniformly "in dealing with conditions of segregation by race in the schools . . . without regard to the origin or cause of such segregation." It would have been totally unnecessary to amend the bill for this purpose. Section 5(a)(1)(A) of the bill already made districts eligible whether they planned to "desegregate" or to "reduce racial imbalance." [52] Even without the Stennis amendment, Senator Mondale said, "[t]he legislation before us today establishes a nationwide Federal standard for the elimination of racial isolation and for the establishment of integrated schools wherever such isolation exists." 117 CONG. REC. 10760 (April 19, 1971). *See also, id.* at 10953 (April 20, 1971) (Sen. Javits).

Moreover, Petitioners' construction of § 1602(a) so enervates the provision as to make a rational observer wonder why Senator Stennis sought to have it included in the law at all. A more informed consideration of the legislative history than is given by Petitioners demonstrates the soundness of the Court of Appeals' reading.

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ment's provisions into two distinct sections without any substantive modification. *See* Pet. Br. at 34 n.*. Only the effect of the proviso on ESAA is at issue here.

[52] S. 1557, 92d Cong., 1st Sess. (1971), *reprinted at* 117 CONG. REC. 12020 (April 26, 1971). *See also*, S. REP. No. 92-61, 92d Cong., 1st Sess. 2, 6, 35-37 (1971).

For several years, Senator Stennis had sought not merely to "*encourage*" (Pet. Br. at 36) federal officials to attack northern, so-called *de facto* segregation, but to *require* them to do so. For example, at his initiative, language similar to that of § 1602(b) [53] was included in the Senate bill which became P.L. 91-230.[54] However, the Conference Committee on the latter bill amended the provision by adding an explanation that it required uniform national application of one policy with respect to "de jure" segregation and uniform national application of another policy with respect to "de facto" segregation.[55] This was not what Senator Stennis had in mind, as he sought to make clear in the amendment he proposed to S. 1557.

Insofar as that amendment covered Title VI and Section 182 (*see* note 50 *supra*), Senator Stennis wished to mandate enforcement, and it was this portion of his amendment (and only this portion) which the sponsors of S. 1557 opposed. Senator Mondale feared that

> [a]lthough it can be read to ask for a uniform policy against discrimination in public education—a policy I vigorously support—many will read the amendment to excuse enforcement of title VI against official discrimination, North and South alike, until such time as the courts declare purely adventitious segregation unconstitutional. This would be a tragic result.[56]

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[53] Senator Stennis' amendment to S. 1557 was "identical to the amendment passed by the Senate last year, with the addition of three words which make it apply to this bill." 117 CONG. REC. 11508 (April 22, 1971). *See* text at note 54 *infra*.

[54] 84 Stat. 121, *reprinted in* [1970] U.S. CODE CONG. & ADM. NEWS 133.

[55] *See id.*, § 2, [1970] U.S. CODE CONG. & ADM. NEWS 134, 2939.

[56] 117 CONG. REC. 10760 (April 19, 1971). *See also, id.* at 10764 (Sen. Mondale); *id.* at 11516 (Sen. Javits) (April 22, 1971). It was

This was hardly idle speculation, as illustrated by a colloquy between Senators Ribicoff and Allen a few days before.[57] But whatever the true or feared impact on Title VI, application of the Stennis amendment to ESAA was straightforward. Senator Stennis wanted to be sure that northern districts were actually required to desegregate, under the same guidelines and criteria as southern districts, in order to receive funds.[58] This application of the amendment to the ESAA program was acceptable to

to this argument, over the amendment's effect on Title VI enforcement, that Senator Stennis was responding in his statements quoted in Pet. Br. at 36.

[57] Senator Ribicoff was seeking to amend S. 1557 to add provisions requiring nationwide planning and implementation of desegregation on a metropolitan area basis within a fourteen-year period. Senator Allen asked:

> If the Supreme Court has already ordered desegregation to a far greater extent than would be achieved under the Senator's amendment at the expiration of 14 years, would it not be unfair to require those school districts to maintain that degree of [de]segregation whereas those metropolitan areas where there is no desegregation have the 14-year period to reach a 50-percent balance.

117 CONG. REC. 10945 (April 20, 1971).

[58] Senator Stennis expressed this concern when the ESAP program was sought to be launched in 1970 through an amendment to the Second Supplemental Appropriations bill. *See* note 30 *supra*. He said:

> Mr. President, that was my point. It has never been said definitely by the President or by Congress where this money is going or whether they are going to require these schools to desegregate.
>
> We know what they will require in the South. But the President has never said that he will require them to desegregate in the North. He says it will be used for the benefit of schools in racially impacted areas.

116 CONG. REC. 20809 (June 22, 1970). In 1971, Senator Eastland supported the Stennis amendment in order to assure that eligibility standards would be applied fairly to northern and southern school districts by HEW employees. *See* 117 CONG. REC. 11514 (April 22, 1971).

its sponsors,[59] as Petitioners recognize (Pet. Br. at 39-40). Their contention that it was intended only to clarify that "de facto" districts could apply for funds under ESAA, however, is supported by neither the language nor the history of the Stennis provision.

5. *Fall, 1971*

The House of Representatives failed to act upon an ESAA bill in time for the 1971-72 school year. Anticipating the extension of ESAP, HEW during the summer promulgated revised regulations which relaxed the requirement of individual school assignments reflecting "substantially the same ratio that exists in . . . the system as a whole" [60] to cover only full-time faculty members.[61] Through continuing resolutions, and over some objections from the sponsors of S. 1557, ESAP was extended until October, 1971;[62] however, because no new authorizing legislation was enacted, Congress appropriated no additional funds for the program during Fiscal Year 1972.[63]

[59] In addition to the Javits statement quoted in Pet. Br. at 39, *see* 117 CONG. REC. 11517 (Sen. Javits) (April 22, 1971):

> . . . if this kind of approach were confined to this bill, I would see a great deal of merit in it. That is what we purport to do with this bill. We want this money used to combat all types of segregation, whether de facto—racial isolation—or de jure.

[60] See 45 C.F.R. § 181.6(a)(4)(vi) (1971), note 32 *supra*.

[61] 36 Fed. Reg. 12984 (July 7, 1971) [proposed]; 36 Fed. Reg. 16546 (August 21, 1971) [final], *reprinted at* 45 C.F.R. Part 181 (1972).

[62] H.R.J. Res. 742, 92d Cong., 1st Sess. (1971), P.L. 92-38, 85 Stat. 89, *reprinted in* [1971] U.S. CODE CONG. & ADM. NEWS 98; H.R.J. Res. 829, 92d Cong., 1st Sess. (1971), P.L. 92-71, 85 Stat. 182, *reprinted in* [1971] U.S. CODE CONG. & ADM. NEWS 198. *See* 117 CONG. REC. 22703-04 (Sen. Mondale), 22704-08 (Sen. Javits) (June 29, 1971); *id.* at 30430 (Sen. Javits) (August 6, 1971).

[63] *See* "Office of Education and Related Agencies Appropriations Act, 1972," H.R. 7016, 92d Cong., 1st Sess. (1971), P.L. 92-48, 85

On November 1, 1971, a new ESAA bill was favorably reported out of committee to the House of Representatives.[64] As in the case of the 1970 House bill, H.R. 2266 included specific eligibility conditions, this time in language identical to that of S. 1557.[65] On the same day, Representative Pucinski sought to have the House consider the matter under a suspension of the rules.[66] Most of the debate now concerned the question whether the anti-busing provisions of the bill were acceptable. The motion to suspend the rules failed.[67]

Two days later, while the House was debating H.R. 7248 (a bill to reauthorize the Higher Education Act), Representative Pucinski announced that he would offer the substance of H.R. 2266 as a floor amendment to that legislation.[68] He did so on the following day[69] and after additional debate about the anti-busing provisions, both the amendment[70] and the bill were passed.[71] The text

Stat. 103, *reprinted in* [1971] U.S. CODE CONG. & ADM. NEWS 115; 117 CONG. REC. 9756 (April 6, 1971) [House]; *id.* at 19218 (June 10, 1971) [Senate]; *id.* at 23033 (June 30, 1971) [Conference Report]; S. REP. No. 92-145, 92d Cong., 1st Sess. 7 (1971); "Supplemental Appropriations Act, 1972," H.R. 11955, 92d Cong., 1st Sess. (1971), P.L. 92-184, 85 Stat. 627, *reprinted in* [1971] U.S. CODE CONG. & ADM. NEWS 709.

[64] Representative Pucinski described it as basically the same bill as had passed the House in December, 1970 (*see* pp. 20-23 *supra*). 117 CONG. REC. 38483 (November 1, 1971).

[65] § 5(d)(1), H.R. 2226, 92d Cong., 1st Sess. (1971), *reprinted at* 117 CONG. REC. 38480 (November 1, 1971). This language was retained in all successive versions of the bills. There was no further debate in the House concerning the precursors of § 1605(d)(1). Senate floor action in 1972, however, is relevant. *See* pp. 33-36 *infra*.

[66] 117 CONG. REC. 38479 (November 1, 1971).

[67] *Id.* at 38493.

[68] *Id.* at 39068 (November 3, 1971).

[69] *Id.* at 39323 (November 4, 1971).

[70] *Id.* at 39339.

[71] *Id.* at 39354.

of H.R. 7248, including ESAA, was then substituted as a House amendment for the text of a Senate-passed higher education reauthorization measure, S. 659[72] and that bill was returned to the Senate.[73]

6. *Winter and Spring, 1972*

On February 22, 1972, S. 659, as amended by the House, reached the Senate floor for the first time. On behalf of the Committee on Labor and Public Welfare, Senator Pell moved that the Senate concur in the House amendment to S. 659 with a substitute of its own.[74] This substitute included ESAA, together with the conditions of eligibility which had been included in both S. 1557 and H.R. 2266 in the previous session. During the debates, many anti-busing amendments were offered and considered. In addition, two proposed amendments to ESAA, including one to the eligibility conditions, are relevant to the matters in dispute.

On February 29, 1972, Senator Chiles introduced an amendment to what became clause (A) of § 1605(d)(1), concerning transfer of property to private schools.[75] The amendment added the words "which it knew or reasonably should have known to be," in order to insure that a school system which transferred property without knowledge that the recipient was a segregated private school would not be penalized. Senator Chiles explained:

> [I]t would provide that it has to be knowingly made or made with some kind of intent, because that was the purpose of Congress originally. I think this

[72] *Id.* at 39374.

[73] Thus, the 1971 House bill (H.R. 2266) became, successively, a part of H.R. 7248 and then S. 659, under which number it was ultimately enacted.

[74] 118 CONG. REC. 4974 (February 22, 1972).

[75] *Id.* at 5982 (February 29, 1972).

> would take care of instances where the school board is doing a valuable job in trying to accomplish desegregation but because they sell some property at public auction or through clerical assistance a sale is inadvertently made by the school district, they find they are in danger of losing all funds and have to pay back funds under the program. That is not what Congress intended.[76]

The Chiles amendment was prompted by the experience of Broward County, Florida under the ESAP program. *See* 118 CONG. REC. 5982-84 (February 29, 1972). In Senator Chiles' view, the district had been ruled ineligible for ESAP because of an inadvertent transfer of property to a private school pursuant to language in the appropriation bill which did not include an explicit requirement of intent[77] (even though, in the Senator's opinion, that is what Congress had meant). To avoid a repetition of the problem, Senator Chiles proposed to amend clause (A) to state such a requirement in the legislation. This was acceptable to the bill's sponsors[78] and the amendment was adopted.[79]

Significantly, Broward County had also been ruled ineligible because of imbalanced faculty assignments,[80] but Senator Chiles proposed no similar amendment to clause

[76] *Id.* at 5983.

[77] The language of P.L. 91-380, 84 Stat. 800, *reprinted at* [1970] U.S. CODE CONG. & ADM. NEWS 944-45 was:

> *Provided further*, That no part of the funds contained herein shall be used (a) to assist a local educational agency which engages, or has unlawfully engaged, in the gift, lease or sale of real or personal property or services to a nonpublic elementary or secondary school or school system practicing discrimination on the basis of race, color, or national origin; . . . .

[78] 118 CONG. REC. 5982 (February 29, 1972).

[79] *Id.* at 5992.

[80] *Id.* at 5983.

(B) even though he suggested that the situation resulting in ineligibility had occurred because of practical, nonracial circumstances similar to those described by Petitioners in this case.[81]

The second suggested amendment which is relevant to this case was also proposed by Senator Chiles. It would clearly have established that only constitutional standards were to apply to at least some classes of applicants by providing that school districts subject to court orders would be exempt from any additional eligibility determinations by HEW.[82] Senator Mondale opposed the amendment on the ground that it would, for example, permit transfers to segregated private schools[83] or, in other words, eliminate the statutory conditions of eligibility. Senator Javits summarized the issue as follows:

> The precise issue is: The Senator from Florida says that when we have a court order, whatever the court order says, we do, and then we qualify for the money.
>
> The Senator from Minnesota (Mr. MONDALE), the Senator from Rhode Island (Mr. PELL) and I say that, in addition to complying with the court order, we have got to comply also with some of the elementary precautions, to prevent the trimming of the desegregation process which may be outside the jurisdiction of the court in that case. That is the real issue. We ran into the situation where property was being transferred to freedom academies, and so forth, so we took the precaution of giving the right to administer what will be done with the money to the governmental department in charge, rather than

[81] *Id.* at 5984.

[82] *Id.* at 6269 (March 1, 1972).

[83] *Id.* at 6270.

> automatically saying that if we comply with a court order we get the money.[84]

This Chiles amendment was defeated.[85] The Senate substitute for the House amendment of S. 659 was then passed [86] and sent to a Conference Committee, which made no material changes in the conditions of eligibility. The Conference Committee's report was passed [87] and became P.L. 92-318 (Education Amendments of 1972), 86 Stat. 235, *reprinted in* [1972] U.S. CODE CONG. & ADM. NEWS 278. Title VII of that act is ESAA.

7. *The Pucinski-Esch Colloquy*

The critical legislative history upon which Petitioners seek to rely is an exchange between Representatives Pucinski and Esch on the House floor when Pucinski introduced the contents of H.R. 2266 as an amendment to the higher education bill (*see* p. 32 *supra*). The exchange is set out in Pet. Br. at 30-31. There is no doubt that it conveys Rep. Pucinski's view that ESAA would not authorize use of the *Singleton* rule as an eligibility requirement. We submit, however, that this "isolated expression of . . . [views [88]] neither is inconsistent with [the HEW regulations n]or is there any other indication in the legislative history that any Member of Congress voted in favor of the statute in reliance on an understanding that" it would weaken the conditions of eligi-

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[84] *Id.* at 6271.

[85] *Id.*

[86] *Id.* at 6277.

[87] *Id.* at 18862 (May 24, 1972) [Senate], 20340 (June 8, 1972) [House].

[88] *See also, Regents* v. *Bakke, supra,* 57 L. Ed. 2d at 767 (opinion of Powell, J.) ("isolated statements of various legislators, taken out of context"); *Califano* v. *Westcott,* 47 U.S.L.W. 4817, 4820 (June 25, 1979) (statutory change "escaped virtually unnoticed in the hearings and floor debates").

bility. *Cannon* v. *University of Chicago,* 47 U.S.L.W. 4549, 4559 (May 14, 1979).

In the first place, Representative Pucinski had complained about adoption of the *Singleton* rule as a condition of eligibility for assistance within a month after adoption of the first ESAP regulations in 1970.[89] As Chairman of the subcommittee which considered all ESAA legislation and as principal sponsor of the measures in the House, he could have sought to alter the conditions of eligibility language in the statute in a manner which would have made clear to his colleagues that the ESAP approach was being disapproved. (For example, he could have proposed language similar to that inserted by Senator Chiles in clause (A), *see* p. 33 *supra,* or providing explicitly that assignment of faculty in substantial accordance with the system-wide ratio was not to be required as a condition of eligibility for assistance.) Instead, his statements at the time of major consideration and debates on the House bill (in 1970 and 1971) emphasized his desire to prevent recurrence of the problems identified in the civil rights groups' study of ESAP.[90] *See* notes 36, 42 *supra.* Furthermore, no debate, agreement with or comment followed Representative Pucinski's November 4, 1971 response to Representative Esch. The discussions of the bill which follow reveal preoccupation with anti-busing measures. These facts make it difficult to determine whether the response represented Congressional sentiment or not. At best, the Esch-Pucinski exchange must be viewed as ambiguous.

Finally, the ESAA regulations adopted by HEW were significantly different from the ESAP regulations with respect to faculty assignment. They did not incorporate the *Singleton* rule and, hence, are perfectly consistent

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[89] *See 1970 House Hearings,* at 783.

[90] *See* pp. 21, 24 *supra.*

with even Petitioners' interpretation of the Esch-Pucinski colloquy.

Singleton v. *Jackson Mun. Separate School Dist.*, 419 F.2d 1211, 1218 (5th Cir. 1969), *rev'd in part on other grounds sub nom. Carter* v. *West Feliciana Parish School Bd.*, 396 U.S. 290 (1970), required assignment of teachers to each school "so that the ratio of Negro to white teachers in each school, and the ratio of other staff in each, are substantially the same as each such ratio is to the teachers and other staff, respectively, in the entire school system." This standard was incorporated in the ESAP regulations.[91] However, the same criterion for eligibility was *not* carried forward in the ESAA regulations proposed on December 2, 1972.[92] Instead, HEW simply required "that full-time classroom teachers be assigned to individual schools so as not to identify any school as intended for students of a particular race, color, or national origin." [93]

The difference between the two guidelines is significant. The *Singleton* standard, as a criterion of eligibility, might require a district in which minority faculty had been randomly assigned to schools to make reassignments so as to insure that variations in faculty racial composition among schools are not "substantial." The ESAA regulations' standard [94] requires reassignment only when the pattern of variations makes schools racially identifiable.

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[91] 45 C.F.R. § 181.6(a)(4)(vi) (1971); 45 C.F.R. § 181.6(a)(4)(vi) (1972).

[92] 37 Fed. Reg. 25746 [proposed]; 38 Fed. Reg. 3452 (February 6, 1973) [final], *reprinted at* 45 C.F.R. § 185.43(b)(2) (1973).

[93] 38 Fed. Reg. 3451 (February 6, 1973) [preamble to final ESAA regulations].

[94] The language of 45 C.F.R. § 185.43(b)(2) as initially adopted in 1972-73 has remained unchanged since that time.

The distinction is explained in HEW's internal manual for its employees who deal with ESAA applications.[95]

The ESAA regulations applied in the instant case, therefore, do not conflict with the Esch-Pucinski colloquy

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[95] Assignment which racially identifies schools.

a. Review available information on the racial composition of the full-time teaching faculty assigned to each of the applicant's schools and the racial composition of the student bodies at those schools. Consider any other information which goes to whether any school is identified as intended for students of a particular race, color, or national origin, such as its pre-desegregation enrollment, its name, its location, or like factors.

b. Determine whether, in the light of the racial composition of its student body and other factors, the racial composition of the faculty assigned to any school confirms the school's racial identification. For example, in a school district with a substantial proportion of both students and faculty from minority groups, a school with twice the relevant districtwide minority student and faculty percentages and no bona fide educational justification for such a heavily minority faculty (e.g., the only teachers qualified for bilingual classes were minorities) would raise serious questions. Bear in mind that the racial composition of the faculty in the applicant's schools as a whole is a given for purposes of this assignment discrimination; what is important is how the existing faculty is assigned among those schools. Thus, a 50 percent black faculty at a school in a LEA with a 5 percent black faculty districtwide would present a much different case than the same faculty in a LEA with a 45 percent black faculty districtwide. Bear in mind, too, that the focus of the inquiry here is whether faculty assignment identifies a school as intended for a particular kind of student. *Thus, where the racial compositions of a school's faculty and student body vary from the appropriate districtwide averages in opposite directions, only the most extraordinary additional facts would support a conclusion of faculty assignment discrimination.*

Office for Civil Rights, HEW, *Handbook for Emergency School Aid Act Programs* 33-34 (1977) (emphasis supplied).

because they do not require mechanical application of the *Singleton* rule.[96, 97]

8. *Summary of Legislative History*

The foregoing analysis of the legislative history of ESAA fairly establishes, we suggest:

—that faculty, as well as student, desegregation was an important goal of ESAA from its inception;

—that addition of the § 1605(d)(1) conditions of ineligibility was directly responsive to the disclosures of ESAP regulation violations in THE EMERGENCY SCHOOL ASSISTANCE PROGRAM: AN EVALUATION, which included segregated faculty assignments;

—that HEW's interpretation of clause (B) of that subsection (to make ineligible for assistance school districts in which faculty members were assigned in racial proportions which matched the student racial distribution among schools) is supported by the Stennis amendment to ESAA, the aim of which was to require that all applicant districts, northern and southern, undertake actual desegregation in order to qualify for funds;

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[96] There is some evidence suggesting that this would meet Representative Pucinski's concerns. *See 1971 House Hearings* at 49 (expressing disapproval of "quota" assignment but acceptance of requirement that faculty be "substantially representative").

[97] The statute provides that an applicant which violated a condition of eligibility after June 23, 1972 could receive assistance pursuant to a "waiver of ineligibilty" if the violation was completely corrected. *Kelsey* v. *Weinberger*, 498 F.2d 701 (D.C. Cir. 1974). The ESAA regulations require, in the case of an applicant which is ineligible under 45 C.F.R. § 185.43(b)(2), that faculty be reassigned to eliminate identifiability and so that the ratio at each school is between 75% and 125% of the district-wide ratio. 45 C.F.R. § 185.44(d)(3) (1978). This remedial standard is not challenged by Petitioners here, who have agreed to much tighter standards to be effective no later than September, 1980. *See* App. 44.

—that during its consideration and passage of ESAA, Congress failed to take any of several opportunities to restrict clause (B) or to confine its scope to constitutional violations; and

—that the current ESAA regulation under clause (B) is not inconsistent with the Esch-Pucinski colloquy upon which Petitioners rely heavily.

Furthermore, the construction of clause (B) to which Petitioners object was issued contemporaneously with the passage of ESAA by the agency to which administration of the program was committed, and has remained consistent and unaltered since that time.

In short, the legislative and administrative history supports fully the Court of Appeals' reading of the statute.

C. Congressional Adoption of the HEW Construction

ESAA was reauthorized in the Education Amendments of 1978.[98] Legislative materials indicate that the attention of the Congress was focused on HEW's interpretation of § 1605(d)(1)(B) by witnesses at hearings who spoke of its application in Los Angeles and New York City. In fact, the House of Representatives' version of the reauthorization bill included a modification of the waiver-of-ineligibility language which was designed to respond to the complaints voiced by these witnesses. However, even that provision was dropped in the Conference Committee Report, which was enacted into law. Thus, the conclusion is inescapable that the Congress has acquiesced in HEW's application of § 185.43(b)(2) of the ESAA regulations.

In 1977 House hearings on the reauthorization, for example, a representative of the Los Angeles United School District complained specifically about application

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[98] § 601 of P.L. 95-561, 92 Stat. 2143, 2252, reprinted in [1978] U.S. CODE CONG. & ADM. NEWS.

of § 185.43(b)(2),[99] and other witnesses were asked about the faculty integration requirement by Congressmen.[100] In the Senate hearings, the President of the American Federation of Teachers cited Chicago, New York, Cleveland, Toledo, Los Angeles "and other AFT cities" in support of his recommendation

> that ESAA be reformed to require a finding of discrimination, not simply a numerical imbalance, before ESAA funds can be cut off.[101]

Senator Javits, who was on the Senate subcommittee, referred specifically to the New York City Title VI agreement requiring reassignment of teachers (App. 44) and asked "what we should do with HEW by way of a change in that situation . . . I will have my staff work with you and we will get Senator Moynihan's staff to do the same." [102]

Ultimately, however, no change was made in the statute. The Senate bill contained no provisions addressed to the problem described by the AFT. The House bill did seek to relax the requirements to obtain a waiver of ineligibility, and the Committee Report cited the Los Angeles testimony explicitly as one justification for the alteration.[103] But the Conference Committee deliberations resulted in dropping even that provision (which

[99] *Part 4: Emergency School Aid Act, Hearings on H.R. 15 Before the Subcommittee on Elementary, Secondary and Vocational Education of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 191 (1977).

[100] *Id.* at 51 (Rep. Quie), 196 (Rep. Perkins).

[101] *Education Amendments of 1977, Hearings on S. 1753 Before the Subcommittee on Education, Arts and Humanities of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 1275 (1977).

[102] *Id.* at 1279.

[103] H.R. REP. No. 95-1137, 95th Cong., 1st Sess. 95-96 (1978), *reprinted in* [1978] U.S. CODE CONG. & ADM. NEWS 5065-66.

modified only the standards for a waiver, not the standards for an initial determination of eligibility).[104] Hence, it is clear that Congress was informed about and carefully considered the application of § 185.43(b)(2) of the ESAA regulations by HEW but decided to impose no modification on the agency. This amounts to Congressional acquiescence in the agency's view of the statute; and even if we were in error in our interpretation of its pre-1978 legislative history, requires that the Court of Appeals' judgment be sustained.

II

II. IF THIS COURT DETERMINES THAT ONLY CONDUCT AMOUNTING TO A CONSTITUTIONAL VIOLATION WILL DISQUALIFY ESAA APPLICANTS UNDER § 1605(d)(1)(B), IT SHOULD RECOGNIZE THE STRONG *PRIMA FACIE* SHOWING OF DISCRIMINATION WHICH IS ESTABLISHED BY THE FACULTY ASSIGNMENT STATISTICS IN THIS CASE AND PUT THE BURDEN ON PETITIONERS TO REBUT THAT SHOWING BY CLEAR AND CONVINCING EVIDENCE

Should this Court disagree with the analysis of the language and legislative history set forth above, and determine that § 1605(d)(1)(B) makes applicants for ESAA funding ineligible only if their conduct (with respect to faculty assignment) rises to the level of a constitutional violation, nevertheless we believe that respondents should prevail in this lawsuit. *See, e.g.*, note 13 *supra* and accompanying text. But as we have argued, it would be inappropriate for this Court to engage in its own review of the administrative record for the purpose of applying the constitutional standard. That should

[104] H.R. CONF. REP. No. 95-1753, 95th Cong., 1st Sess. 286 (1978), *reprinted in* [1978] U.S. CODE CONG. & ADM. NEWS 5189.

be the task of the lower courts on remand.[105] We do believe that it would be desirable for this Court to provide some guidance in this area. Specifically, we suggest that because of the nature of the faculty assignment process, the principles developed in jury discrimination cases should be carried over.

What is at issue is the weight to be accorded statistical evidence when, as in the instant case, such evidence demonstrates an overwhelmingly high correlation or association between schools' minority student enrollment proportions and their faculty minority proportions. Neither the district court,[106] the Court of Appeals [107] nor the Department of HEW [108] takes the position, even under a nonconstitutional test, that such statistics conclusively demonstrate ineligibility. The Department's ESAA manual, for example, instructs employees to take into account any "bona fide educational justification for such a heavily minority faculty (e.g., the only teachers qualified for bilingual classes were minorities) . . . ." [109] What will remain unclear from a simple declaration that § 1605 (d) (1) (B) incorporates constitutional standards are questions about the role of statistics, the burdens of proof and persuasion, etc. These questions may have controlling

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[105] *See* note 12 *supra*.

[106] Pet. App. 104, 106.

[107] *See* 584 F.2d at 589.

[108] *See* note 95 *supra*. Although it appears that the former Associate Commissioner for Equal Educational Opportunities, Dr. Herman Goldberg, initially took a different view of ESAA when he held the first informal hearing on New York City's 1977-78 application, *see* Pet. App. 43-45, that error was corrected by the reconsideration ordered by the district judge, and by the Court of Appeals' approach, *see* 584 F.2d at 589. In any event, the Department's position is now enunciated in its ESAA manual, and we do not understand the government to disagree with this aspect of the Court of Appeals' approach.

[109] *See* note 95 *supra*.

impact upon the agency's workload and may, as a practical matter, determine the eligibility status of applicants in the future. Therefore, if the Court holds that § 1605 § 1605 (d) (1) (B) adopts constitutional standards, we urge that these issues be addressed now rather than being postponed.

The high correlation between a New York City school's minority student enrollment and its minority faculty complement, demonstrated by the statistics in this case, supports an inference that the pattern results from discrimination.[110] This Court's decisions have never explicated the proof required to overcome such a *prima facie* case of unconstitutional faculty assignments.[111] With respect to employee hiring and jury selection, however, two different standards have emerged.[112]

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[110] *See Dayton Bd. of Educ.* v. *Brinkman*, 47 U.S.L.W. 4944, 4946 n.9 (July 2, 1979); *Furnco Const. Corp.* v. *Waters*, *supra*, 57 L. Ed. 2d at 966-67; *Dothard* v. *Rawlinson*, 433 U.S. 321, 328-31 (1977); *Hazelwood School Dist.* v. *United States*, 433 U.S. 299, 306-08 (1977); *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 339 (1977); *Castaneda* v. *Partida*, 430 U.S. 482, 495-97 (1977); *cf. Washington* v. *Davis*, *supra*, 426 U.S. at 241-42.

[111] In all of the cases touching on the issue, whether the pattern of faculty assignment had been produced by intentional action was not in question. *See United States* v. *Montgomery County Bd. of Educ.*, 395 U.S. 225, 229 (1969); *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430, 434-35, 442 n.6 (1968); *Bradley* v. *School Bd. of Richmond*, 382 U.S. 103, 105 (1965); *Rogers* v. *Paul*, 382 U.S. 198, 200 (1965); *cf. Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. at 18.

[112] Although Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.*, establishes a stricter test of discrimination than the Equal Protection Clause, *see Washington* v. *Davis*, *supra*, 426 U.S. at 247-48, it appears that in cases invloving individualized, rather than systematic, discrimination, the proof required to overcome a plaintiff's *prima facie* showing is the same, whether the claim is statutory or constitutional in nature. *Compare Washington* v. *Davis*, *supra*, 426 U.S. at 246 with *Furnco Constr. Corp.* v. *Waters*, *supra*, 57 L. Ed. 2d at 967-69.

In hiring cases, the *prima facie* case is rebutted once a "justification which is reasonably related to the achievement of some legitimate goal" is articulated as the basis for the hiring decisions. *Furnco Constr. Corp.* v. *Waters*, *supra*, 57 L. Ed. 2d at 968; *Washington* v. *Davis*, *supra*, 426 U.S. at 246.[113] The burden of persuasion then is upon the plaintiff to establish that the purported nonracial justification was merely pretextual. *Furnco*, 57 L. Ed. 2d at 968. In contrast, in the jury cases, this Court has explicitly rejected mere assertions of neutrality in the operation of the selection system as adequate to overcome the *prima facie* case and to shift the burden back to the party claiming that discrimination has occurred. For example, in states which employ the "key man" system of jury selection, the claim that the jury commissioners were not instructed to consider race will not rebut a *prima facie* case of systematic underrepresentation. *Castaneda* v. *Partida*, *supra*, 430 U.S. at 497-99. Nor will mere assertions of nondiscriminatory conduct.[114]

This difference appears to be related to the special susceptibility of the jury selection *process* to abuse, *Castaneda*, 430 U.S. at 497. Whereas in the hiring case the articulation of a nonracial justification shifts the burden back to the plaintiff to establish that the claimed nonracial justification was not the real reason for the hiring decision, in the jury case the burden is upon the state to show that the claimed nonracial justification was in fact the cause for the pattern of underrepresentation.

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[113] ". . . we think the District Court correctly held that the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing racial composition of the recruit classes and of the force in general, *and the relationship of the test to the training program* negated any inference that the Department discriminated . . ." [emphasis supplied]. *But see International Bhd. of Teamsters* v. *United States*, *supra*, 431 U.S. at 342 n.24 (1977).

[114] *See, e.g.*, cases cited in *Castaneda*, 430 U.S. at 498 n.19.

Castaneda, 430 U.S. at 488 n.8. We believe that cases in which a claim of discriminatory faculty assignment is made are more akin to the jury cases than to the hiring suits, and we urge the Court so to declare. Only clear and convincing evidence of a nonracial mechanism of faculty allocation which avoids the "opportunity for discrimination" [115] should suffice to rebut a *prima facie* showing of discrimination.

Unlike recruitment or hiring, the assignment of a finite systemwide pool of faculty members under contract to a school system is peculiarly within the control of the system. *See, e.g.*, Ct. App. App. at 435 *et seq.* (Chancellor of New York City school system retains ultimate authority to reassign teachers). For this reason, statistics demonstrating a pattern of assignment of black faculty disproportionately to black schools establish a strong basis for an ultimate finding of discrimination.[116] If such a showing may be overcome by the mere assertion that it results from the operation of a combination of factors which are not formally based upon race (*see* Pet. Br. 61-62), without compelling evidence that the process as a whole excludes the "opportunity for discrimination" to take place, then the value of the statistical showing will be completely undermined.[117]

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[115] *Whitus* v. *Georgia*, 385 U.S. 545, 552 (1967).

[116] *Kelly* v. *Guinn*, 456 F.2d 100, 107 (9th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973); *Morgan* v. *Hennigan*, 379 F. Supp. 410, 456-61 (D. Mass.), *aff'd sub nom. Morgan* v. *Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Davis* v. *School Dist. of Pontiac*, 309 F. Supp. 734, 742-44 (E.D. Mich. 1970), *aff'd* 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971); *cf. Kelley* v. *Metropolitan County Bd. of Educ.*, 317 F. Supp. 980, 991-92 (M.D. Tenn.), *stay order rev'd*, 436 F.2d 856 (6th Cir. 1970); *Mays* v. *Board of Pub. Instruction*, 428 F.2d 809 (5th Cir. 1970).

[117] It can be argued, for example, that it is "nonracial" to leave hiring (and thus assignment) to school principals. Can such a justification realistically be permitted to overcome a statistical

Such an approach throws upon the party claiming discrimination the burden of discovering and recreating the actual workings of the assignment procedure, including the necessity of interviewing and presenting the testimony of all the third parties to whom a school district's responsibility for faculty assignment may be sought to be partially or completely delegated, in order to establish that the statistical patterns are in fact manifestations of improper conduct.[118] Yet not only is the information about actual faculty assignment procedures normally within a district's custody and control;[119] but also it is the non-delegable "obligation of every *school district* . . . to operate now and hereafter only unitary schools." *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19,

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prima facie case? *See Morgan* v. *Hennigan, supra*, 379 F. Supp. at 460; *cf. United States* v. *Greenwood Mun. Separate School Dist.*, 406 F.2d 1086, 1094 (5th Cir.), *cert. denied*, 395 U.S. 907 (1969). The same is true of a scheme in which individual teacher preferences are given effect, even if they are racially motivated (*see* Ct. App. App. 368). *Cf. Mays* v. *Board of Pub. Instruction, supra.*

[118] The implications are particularly serious in the context of this case. The statute unequivocally authorizes HEW to require submission, along with the application for ESAA funds, of information necessary to make the eligibility determination. 20 U.S.C.S. § 1605(d)(5) (Supp. 1978). Currently the agency requires only an assurance of nondiscrimination with respect to faculty assignment, 45 C.F.R. § 185.13(l)(2)(i) (1978); actual distribution of faculty is available through statistical reports required to be filed with HEW or the EEOC. However, if the quantum of proof necessary to find ineligibility is substantially raised, HEW may find it necessary to increase drastically the amount of information which applicants must supply so that it may be in a position to carry out the statutory mandate. Such new paperwork burdens would affect innocent and discriminating applicants alike, but they would be unnecessary if a strong statistical showing put the burden on the individual district to persuade HEW by clear and convincing evidence that its assignment processes were *in fact* truly nonracial.

[119] *See, e.g., International Bhd. of Teamsters* v. *United States, supra*, 431 U.S. at 359 n.45.

20 (1969) (emphasis supplied).[120] *Compare Milliken* v. *Bradley*, 418 U.S. 717, 741-52 (1974).

It seems far more sensible, where faculty assignment is concerned, to hold that a statistical showing of the magnitude made in this case shifts to the school district not only the burden of production, but also the burden of persuasion on the issue of discrimination. *See, e.g., Carey* v. *Piphus*, 435 U.S. 247, 260 (1968); *Mount Healthy School Dist.* v. *Doyle*, 429 U.S. 274, 287 (1977). In order to overcome the statistical *prima facie* case, a school district should be required to establish by clear and convincing evidence that discriminatory purposes played no part in the process of assignment; if the proof is in equipoise, the plaintiff should prevail. This allocation of the burden comports with common sense, for the information about the particulars of faculty assignment will be far more accessible to school authorities than to outside parties or agencies. In addition, in light of the "strong *prima facie* case" showing, *Norris* v. *Alabama*, 294 U.S. 587, 598 (1935), any risk of error should be borne by the school district.

Application of these principles to the case at hand will not be difficult for the lower courts on remand. New York has articulated justifications for the pattern of faculty assignment in the district in 1976. It should bear the burden of producing evidence to substantiate the claim that such justifications were actually operative in the assignment process (*see, e.g.*, Ct. App. App. 325 [distribution of teachers by race among fields of licensure]). Some of its claims were explicitly rejected by

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[120] With this principle in mind, it would appear that the agency's and district court's use of a "foreseeability" standard (*see* Pet. Br. 57-61) was nothing more than a shorthand description for a conclusion that the school district had failed to take steps to assure that discriminatory purposes on the part of any of the multiple actors to whom it had delegated responsibility for faculty assignments would not be given effect.

HEW (*see, e.g.*, Ct. App. App. 507 [majority of qualified bilingual teachers are not Hispanic], 504 [continued predominance of white faculty in predominantly white schools unaffected by change in student racial composition of entire district]). The district court should review HEW's findings based upon the principle that it was Petitioners' burden to back up their claims convincingly, and not just to articulate plausible claims. In the case at hand, this would require the ESAA applicant to demonstrate not only that it administered a formally nonracial mechanism of faculty allocation, but also that the mechanism was not infected by racially based actions of third parties to whom individual decisions were delegated. Unless that burden was carried, HEW's ineligibility determination should be sustained.

CONCLUSION

For the foregoing reasons, *amicus* respectfully submits that the judgment below should be affirmed.

Respectfully submitted,

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